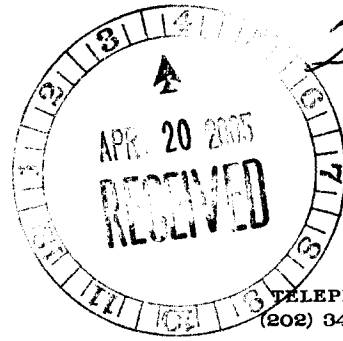


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April 20, 2005

VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, D.C. 20423

ENTERED
Office of Proceedings

APR 20 2005

Part of
Public Record

Re: Ex Parte No. 657, Rail Rate Challenges Under
the Stand-Alone Cost Methodology

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are the original and ten copies of the Written Comments of Kennecott Utah Copper Corp.

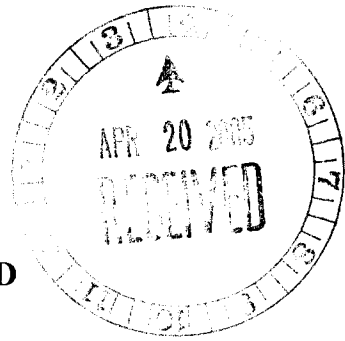
We have enclosed an additional copy of this filing. Kindly indicate receipt and filing by time-stamping this copy and returning it to our messenger.

Sincerely,

Christopher A. Mills

CAM:jml
Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



RAIL RATE CHALLENGES)	
UNDER THE STAND-ALONE)	
COST METHODOLOGY)	Ex Parte No. 657
)	

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COMMENTS OF KENNECOTT UTAH COPPER CORP.

UTAH KENNECOTT COPPER CORP.

By: James M. Elegante
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Dated: April 20, 2005

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



RAIL RATE CHALLENGES)	
UNDER THE STAND-ALONE)	Ex Parte No. 657
COST METHODOLOGY)	
)	

COMMENTS OF KENNECOTT UTAH COPPER CORP.

Kennecott Utah Copper Corp. ("Kennecott") submits these written comments pursuant to the Board's Notice served February 16, 2005 and subsequent Decision served March 14, 2005 in this proceeding.

Kennecott's understanding is that the basic purpose of this proceeding is to receive views on the subject of rail rate reasonableness challenges under the Board's stand-alone cost ("SAC") methodology, and whether there are broad issues that may cut across SAC rate cases generally. Kennecott submits that the Board should consider rate-reasonableness issues that go beyond refinements to the SAC methodology, including (1) the relationship between that methodology and the Board's "small rate case" standards and (2) the adoption of a more practical understanding of the jurisdictional requirement that a rail carrier possess market dominance over the issue traffic.

Specifically, the Board should adopt rules that facilitate a rail shipper's decision whether to pursue a rail rate case using the SAC methodology or the small rate case standards, and in particular clarify the criteria the Board will use in determining

whether a shipper qualifies for possible relief under the small rate case standards and the procedures for such cases. In addition, the Board should re-examine the proposition that “effective” competition exists for purposes of making a market dominance determination if a shipper is served at origin and destination by two rail carriers. The Board should acknowledge that there can be situations in which two carriers technically have the ability to provide service, but there nevertheless is an absence of “effective” competition. In such situations the Board should permit rate challenges to go forward.

I. Background and Interest of Kennecott

Kennecott is primarily a mining, smelting and refining company with facilities in the Great Basin region of the western United States. Kennecott is the second largest producer of copper in the United States. It produces approximately 300,000 tons of copper cathode per year and supplies about 15% of the nation’s copper demand. Kennecott-produced copper comes from the Bingham Canyon Mine located near Salt Lake City, Utah. Kennecott ships copper, primarily by rail, to copper fabricators throughout the United States.

Kennecott also produces sulfuric acid as a by product of the smelting process, amounting to approximately one million tons per year. All of this acid is sold to fertilizer and industrial customers throughout the United States, and most of it is also shipped by rail.

Kennecott’s copper and sulfuric acid production facilities in Utah are directly served by the Union Pacific Railroad (“UP”). BNSF Railway Company

("BNSF"), through its contractor the Utah Railway, also has access to those facilities using the "Central Corridor" trackage rights it obtained from UP as a result of the Union Pacific/Southern Pacific merger in 1996.

Some high-volume Kennecott movements are captive to a single rail carrier. For example, Kennecott ships substantial quantities of acid from Garfield, Utah to a customer located in Epco, Idaho; this customer is served exclusively by UP. Other Kennecott shipments of both acid and copper – in particular shipments to customers located in the Eastern United States – can use either UP or BNSF for the portion of the transportation between Utah and Midwestern connections with other rail carriers that serve the eastern customers. UP uses its own lines to move Kennecott shipments from Utah to its connections with those rail carriers. BNSF uses its UP Central Corridor trackage rights to move Kennecott traffic between Utah and Denver, and then uses its own lines east of Denver to reach connections with those rail carriers.

Currently, both BNSF and UP provide service to Kennecott for the movement of copper and acid pursuant to rail transportation contracts and other pricing arrangements. These contracts and pricing arrangements expire between June 2005 and early 2006. Kennecott's discussions with both carriers to date indicate that, upon the expiration of the existing transportation arrangements, each carrier intends to convert Kennecott's copper and acid shipments to common carrier service at substantially higher rates. If negotiations for new rate and service terms should fail, then Kennecott will consider seeking regulatory relief from the Board.

II. Use of SAC or Small Rate Case Standards

If it becomes necessary for Kennecott to seek regulatory relief, Kennecott may be able to institute a SAC rate reasonableness proceeding for certain movements. However, given the complexities and expense of SAC rate cases, Kennecott would consider using the Board's small rate case procedures if there were more certainty about the process, timeline and cost of using those procedures.

Kennecott is aware that the Board conducted a hearing last year in *Ex Parte No. 646, Rail Rate Challenges in Small Rate Cases*, in which it heard proposals from various shipper groups for handling such cases and how small rate cases should be defined. These groups underscored the need for a "bright-line" standard to determine a shipper's eligibility to use the guidelines, the need for greater predictability in the existing standards, and the need for simplified and expeditious handling of small rate cases.

Unfortunately, to date the Board has not addressed these issues, and in particular the issue of who is eligible to use the small rate case procedures. This is an important issue for a shipper such as Kennecott.¹ Kennecott needs to be able to make a reasoned determination of whether it is eligible to use the small rate case procedures, and if so, whether it is more appropriate to use those procedures or the SAC procedures. In this regard Kennecott needs to be able to assess the relative cost of each procedure, and

¹ Kennecott understands that the principle eligibility issue involves whether a shipper must be "small" in terms of its size in order to bring a case under the small rate case standards, or whether a large entity may bring such a case if its relevant traffic volume is too small to warrant the time and expense of prosecuting a SAC rate case.

the relative time required to prosecute each type of rate case to a decision on the merits. Unfortunately, it is not presently in a position to do so because of the lack of needed information.

Unlike small shipper rate cases, a number of SAC rate cases have been initiated and decided which allows some understanding of the SAC process. The small rate case process is more opaque. The Board should adopt rules concerning the issues raised in the *Ex Parte No. 646* proceeding that enable a shipper such as Kennecott to determine how to proceed if it ultimately decides to seek rail rate-reasonableness relief. Kennecott submits that there needs to be a “bright-line” test for determining shipper eligibility to use the small rate case procedures, as well as clarity and predictability in the process including a defined, reasonable amount of time (*e.g.*, six months) for resolution of cases brought under those procedures.

III. Need for Review of the Qualitative Market Dominance Standard

The Board has jurisdiction to consider the reasonableness of a challenged rail rate (and thus to apply the SAC test or its small rate case standards) only if the carrier involved exerts market dominance over the traffic in issue. 49 U.S.C. § 10701(d). Market dominance is defined as “an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies.” 49 U.S.C. § 10707(a).

The Board’s market dominance review is divided into two parts: a “quantitative” review and a “qualitative” review. The quantitative review addresses

whether the challenged rate exceeds a 180 percent revenue-cost percentage. *Id.* The qualitative review, which occurs only if the 180-percent “jurisdictional threshold” test has been met, involves an analysis of “whether there are any effective transportation alternatives for [the issue] traffic.”² In conducting this review, the Board examines the evidence submitted by the parties to determine whether effective intramodal or intermodal competition exists. *See Ariz. Pub. Serv. Co. v. United States*, 742 F.2d 644, 650-51 (D.C. Cir. 1984) (effective competition means that “there are competitive, market pressures on the railroads deterring them from charging monopoly prices for transporting goods”).

Notwithstanding general statements by the Board and its predecessor indicating that the focus of the agency’s analysis of intramodal or intermodal competition is supposed to be on what is “feasible” or “economically practicable,” rather than on what is “possible,”³ the Board has indicated that if at least two rail carriers or groups of rail carriers can transport the same commodity between the same origin and destination, effective intramodal competition exists. *Consolidated Papers, Inc. v. Chicago and N.W. Transp. Co.*, 7 I.C.C.2d 330, 337 (1991); *West Texas Utilities Company v. Burlington Northern RR Co.*, 1 S.T.B. 638, 650-51 (1996). However, based on current experience,

² *Wisconsin Power & Light Company v. Union Pacific R.R.*, Docket No. 42051 (STB served September 13, 2001) at 8.

³ *E.g., Westinghouse Elec. Corp. v. Alton & S. Ry.*, Docket No. 38188 (ICC served Feb. 9, 1988) at 5; *Gen. Electric Co. v. Baltimore & O. R.R.*, Docket No. 38125 (ICC served Oct. 22, 1984) at 2; *Arizona Public Service Co. v. Atchison, T. & SF. Ry. Co.*, 2 S.T.B. 367, 373-74 (1997).

Kennecott's observation is that two carriers serving the same origin and destination does not necessarily result in effective intramodal competition.

As indicated earlier, BNSF's ability to provide service to Kennecott's Utah facilities depends upon its use of trackage rights over UP's Central Corridor lines that serve the Salt Lake City area. BNSF is obligated under the terms of its agreement with UP to pay a significant trackage rights fee for the use of those lines, and it must also compensate the Utah Railway for its origination services. The result is that BNSF has a competitive disadvantage relative to UP for this traffic, and UP therefore is able to price its services at high levels. Indeed, Kennecott believes, based on proposals from the carriers, that the combination of the trackage rights and Utah Railway fees and BNSF's lack of traffic volume on the lines involved significantly hinders BNSF in providing competitive service at competitive rates. Thus, while two rail carriers can transport Kennecott shipments in the Central Corridor, there does not appear to be "effective competition" between them.

Of equal concern to Kennecott are recent indications that BNSF and UP may be using their new public pricing initiatives as market-dividing vehicles. Preliminary indications are that neither BNSF nor UP is now competing aggressively to win business from the other carrier despite the fact that each may have the physical capability to do so. If one "competitor" were to refuse to quote rates for service, or were to quote rates that substantially exceed the other carrier's published rates for the service, there could be no serious suggestion that "effective" competition actually exists.

For the reasons described above, Kennecott submits that the Board should adopt rules that enable rail shippers to make a meaningful assessment of whether to bring a rate reasonableness proceeding under the SAC test or the small rate case standards. The Board should also adopt a policy for future rate reasonableness proceedings specifying that there is no presumption that market dominance exists in those situations where two rail carriers or combinations of rail carriers serve both the origin and the destination for a movement.

Respectfully submitted,

UTAH KENNECOTT COPPER CORP.

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